IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.815 OF 1990

Shivling Shankar Mehandale
Age -34 years, Occupation :
Police Constable, R/o.Khayade,
Gilane, Taluka : Malegaon,
District : Nashik. .. Appellant
(Orig. Accused)

Versus

State of Maharashtra .. Respondent
(Orig. Complainant)

Shri R.R. Bhonsale for the Appellant
Shri P.A. Pol APP for the State

CORAM : D.G. DESHPANDE,
& S.R. SATHE,JJ.
DATED : 04/05/2007

ORAL JUDGEMENT :- (PER S.R.SATHE,J.)

1. The appellant, the original accused in case No.32 of 1989 has preferred this appeal against the Judgement and order passed by the Court of second Additional Sessions Judge, Nashik whereby the accused was convicted for the offence punishable under section 302 of IPC and sentenced to suffer imprisonment for life and also convicted for the offence punishable under section 498-A of IPC and sentenced to suffer R.I. for one year and to pay fine of Rs. 100/- in default to suffer R.I. For 15 days.

2. The brief facts giving rise to this appeal are as under :

Complainant Nadarabai Suranje was residing at Nandgaon District Nashik alongwith her sons. Her daughter Taibai got married with the accused some time in the year 1986. According to her, the accused who was then working as Police Constable approached her and told her that his first wife has expired and he has daughter from her and he intends to marry with her daughter. As a result of the same, she agreed to give her daughter Taibai in marriage to accused and their marriage was performed. At the time of marriage the accused did not demand anything, however, after marriage he started demanding articles and utensils. The complainant also provided the same. Few days after marriage when Taibai returned to her maiden home, she informed the complainant that the accused was harassing her on the ground that dowary articles were not given to him. She also told the complainant that accused even used to assault her on that count and once he had even assaulted her with a sickle. About 6 months after the marriage accused once made an attempt to set Taibai on fire. She, therefore, lodged a compliant with Police and on the basis of the same, offence under section 307 of IPC was registered against the accused. Not only that but he was also suspended from his service. 6-7 months after the said compliant, accused approached the

complainant and gave assurance that he would treat Taibai properly. Hence complainant sent Taibai to accused. Thereafter, accused was transferred to Nashik and as such, the accused and Taibai started residing in room No.5 of Pawan Nagar, Cidco Colony, Nashik. Even at that place, the accused was ill treating Taibai.

3. On the day of incident i.e. on 15/10/1988, Taibai, accused and their minor daughter were only in their house at Cidco. At about 1.30 am or so the adjacent neighbourers heard shouts of Taibai. Hence they went out of the house and they found that Taibai was sitting in front of her house and she was crying and weeping and had sustained burn injuries. Accused was also there. He then took Taibai to Hospital. Both of them proceeded from the house on foot.

4. On the day of incident, compliant and her son returned from Mumbai and when they come to know that Taibai is admitted in Hospital as a result of sustaining burn injuries they immediately went to Civil Hospital, Nashik and met Taibai. When they made query with Taibai as to how she sustained injuries, she told them that accused threw lighted kerosene lamp (chimani) on her person and set her on fire. She also

told them that the accused then brought her to hospital. When this was told to the complainant and his son, both of them went to the Police Station on 16/10/1988 and lodged the complaint against the accused. On the basis of the said complaint, Police registered offence at C.R. No.229 of 1988 against the accused.

5. Immediately, after the time Taibai was admitted in the hospital in burnt, police managed to record her dying declaration and then drew the panchanama of the house of the accused. After C.R. No.229/1988 was registered, PSI Jagtap took the investigation and recorded the statements of various witnesses including neighbours. He again sent requisition to the Special Judicial Magistrate Jaiprakash Chavan and he recorded dying declaration of Taibai on 16/10/1988 at about 5.30 pm. In that dying declaration, Taibai told him that accused was ill treating her and used to assault her and take suspicion about her character. She also told that on the day of incident when she was sleeping the accused threw lighted kerosene lamp (chimani) and set her on fire. Taibai succumbed to the burn injuries on 16/10/1988 at night. Police, therefore, registered the offence punishable under

section 302 of IPC against the accused.

6. Police arrested the accused on 21/10/1988. Police then sent the dead body to Taibai for postmortem. Doctor opined that death was caused as a result of burn injuries. Police also sent the attached articles i.e. clothes of the deceased to C.A. who opined that kerosene residues were found on the clothes and blowse of the deceased. After completion of investigation, Police submitted charge-sheet against the accused in the Court of JMFC, Nashik for the offence mentioned above.

7. Finding that accused was charge-sheeted for the offence punishable under section 302 of IPC which was exclusively triable by the Court of Sessions, the learned JMFC committed the case to the Sessions Court, Nashik.

8. The learned Second Additional Sessions Judge framed charge Exh-4 against the accused for the offences mentioned above. The charge was read over and explained to the accused. He pleaded not guilty and claimed to be tried. His defence is of total denial. From the suggestions put to the Prosecution witnesses

and the statement of the accused recorded under section 313 of Cr.P.C. it appears that it is the defence of the accused that as there was no electricity in their house they had kept burning kerosene lamp (**chimani**) on stool. At midnight, Taibai started shouting, hence, accused awoke and immediately put the quilt on the person of Taibai and then he took her to the hospital. His contention is that a false case is lodged against him.

9. In order to bring home the guilt of the accused the prosecution examined in all 10 witnesses consisting of mother of the deceased i.e. complainant Nadarabai Suranje Exh-14, PW-2 pancha Witness Vishram Sonawane Exh-16, PW-3 neighbour of the deceased viz. Nutan Satyal Exh-18, another neighbour PW-4 Parigha Deshmane Exh-19, PW-5 Special Judicial Magistrate Jaiprakash Chavan Exh-21, PW-6 brother of the deceased Chandrabhan Suranje Exh-25, Police Constable PW-7 Vijay Pawar Exh-26, PW-8 Dr. Shivaji Lahade Exh-31 who did postmortem on the dead body of Taibai, PW-9 pancha witness Kisan Prabhakar Jadhav and PW-10 Investigating Officer PSI Anilkumar Jagtap Exh-36. The Prosecution produced certain documents such as complaint Exh-15, panchanama of the place of offence Exh-17, dying declaration of the deceased Exh-23, copy of FIR filed by the deceased

against the accused on 12/03/1987, charge-sheet of the earlier case Exh-29, P.M. Notes Exh-32, Arrest Panchanama Exh-35 and C.A. Report Exh-38. Accused examined one defence witness Prabhakar Bawiskar the Special Judicial Magistrate who had recorded first dying declaration of the deceased.

10. After considering the evidence adduced by the parties, the learned Trial Judge came to the conclusion that the Prosecution has proved beyond reasonable doubt that deceased Taibai was subjected to the cruelty and harassment at the hands of the accused and that on the day of incident, he threw lighted kerosene lamp on her person and set her on fire and thereby committed her murder. He, therefore, convicted the accused for the offence punishable under section 498-A and section 302 of IPC and sentenced him as mentioned above.

11. Being aggrieved by the order of conviction and sentence passed against him, the accused has filed the present appeal. In this appeal before us, Shri R.R. Bhonsale learned Advocate for the accused has urged only three points. Firstly, he submitted that the learned Trial Judge has not properly appreciated the evidence and has failed to take into consideration the

contradictions in the two dying declarations. Secondly, he canvassed before us that the deceased had even stated in her dying declaration that the accused extinguished fire and took Taibai to hospital. Lastly, he submitted that the prosecution has failed to prove alleged motive and the death of Taibai was in fact due to accident. According to him, **Chimani** which was kept on the stool accidently fell on the person of Taibai and she sustained burn injuries. He, therefore, submitted that the evidence on record is certainly not sufficient to prove the guilt of the accused beyond reasonable doubt. He, therefore, submitted that the appeal be allowed and the accused be acquitted. As against this, learned APP supported the judgement and order passed by the learned Trial Judge.

12. It is not in dispute that the marriage of Taibai and the accused had taken place some time in the year 1986 or thereabout and admittedly, it was not the first marriage of the accused. In fact, his first wife was no more and he had daughter from first wife and after his marriage with Taibai, all of them were residing together. It is also not in dispute that in the year 1987, Taibai had filed the complaint against the accused alleging that he tried to commit her murder

by setting fire to her and on the basis of the said complaint case was filed against him for the offence punishable under section 307 of IPC and he was suspended from service. It is also an admitted fact that subsequently, accused was acquitted in the said case. Admittedly, on 15/10/1988 at about 2.00 am or so Taibai was admitted in Civil Hospital, Nashik and she had sustained about 70% burns. It is also not in dispute that she died as a result of the said burns.

13. The main and the material question is whether the death of the Taibai is accidental or homicidal. It is nobody's case that death of Taibai is suicidal. Before considering the question as to whether the death is accidental or suicidal, it would be worthwhile to see as to whether there used to be quarrels between deceased and the accused and whether accused was ill-treating the deceased as alleged?

14. Complainant Nadrabai Suranje Exh-14 has stated that accused approached her and proposed that she should give her daughter in marriage to him and as accused was also of the cast of the complainant and serving in Police Department, Taibai was given in marriage to the accused. She has stated that though the

accused had not demanded anything at the time of marriage, subsequently, he started making such demand and her daughter Taibai had told her accordingly. Not only that but she had also stated that as per the demand, they had provided copper water boiler to the accused. She has further stated that few days after the marriage when Taibai came to her, she told her that accused was ill-treating her on the ground of not providing articles and even used to assault her and once, he had beat her with sickle. It is pertinent to note that this version is also corroborated by PW-6 brother of the deceased Chandrabhan Suranje Exh-25. Not only that but if we see the evidence of witness PW-3 neighbour of the deceased viz. Nutan Satyal Exh-18 we find that she has also stated that there used to be quarrel between accused and the deceased Taibai. Admittedly, this witness is residing in the adjoining room of the accused. So, she was even in a position to listen quarrels even when she was in her room. It is pertinent to note that this witness has also stated that accused even used to assault Taibai. Her evidence is not at all shaken or shattered in the cross-examination. On the contrary, if we carefully read her evidence it appears that she has even plainly admitted that accused and Taibai were speaking in different

languages and as such, she was unable to understand the reason behind the quarrel. It must be noted that there is absolutely nothing on record to show that this witness was having any dispute with the accused. All that is suggested to this witnesses is that she is deposing falsely at the instance of Police. In fact, there is no reason why police should go out of the way and tell this witness to state something false against the accused, particularly when, the accused is also from the Police Department. It must be noted that the accused has nowhere even suggested that some Policemen or officer in his department were against him as a result of any particular reason. So, under such circumstances, there is absolutely no substance in the suggestions made to the said witness that she deposed falsely at the instance of Police. On the contrary, we find that evidence of this witness is quite trustworthy. Same is the case in respect of the other witnesses viz. PW-4 Parigha Deshmane Exh-19. She has also stated that there used to be quarrel between accused and his wife Taibai and accused even used to assault her. Both these witnesses are independent witnesses. As they are residing in adjoining to the house of the accused they are natural witnesses and due weightage shall have to be given to their

testimony.

15. The Prosecution has produced at Exh-28 the copy of the FIR filed by the deceased in the year 1987 against the accused. Admittedly, on that basis charge-sheet was filed against the accused for the offence punishable under section 307 of IPC. No doubt, the accused has been acquitted in that case. However, if we take into consideration the totality of evidence then it does appear that accused was ill-treating and harassing Taibai and the conduct of accused was amounting to cruelty as contemplated under section 498-A of IPC.

16. In order to prove the charge under section 302 of IPC there is no direct evidence in this case. Nobody has actually seen the accused while setting fire to Taibai. Admittedly, the incident has taken place at midnight at about 1.30 am. However, it is crystal clear from the evidence of PW-3 Nutan Satyal and PW-4 Parigha Deshmane Exh-18 and 19 respectively that on the date of incident at midnight, they heard shouts and when they went out of the house, they found that Taibai was sitting in front of her room and she had sustained burns and was weeping and crying. They have also stated

that at that time, quilt was placed on her person and then the accused was very much present there. He then took her to hospital. Even from the defence evidence, it is very clear that when Taibai sustained burn injuries, she was in her house and at that time, besides accused and his minor daughter nobody else was present there. Now it is the defence of the accused that at that relevant time, the burning kerosene lamp was placed on the stool and the same might have fallen on the person of Taibai and as a result of the same, she sustained burns. So we have to see whether this defence of the accused is probable? In order to substantiate this defence the accused has examined Special Judicial Magistrate Prabhakar Bawiskar Exh-45. He has stated that on 15/10/1988 when he received requisition from the Police Station he went to the Civil Hospital Nashik and recorded the dying declaration of Taibai at 3.30 am and in the said dying declaration, she has stated that a burning kerosene lamp (chimani) was kept on the stool and when she was sleeping, the said Chimani fell on her person and she sustained burns and she, therefore, shouted and her husband (accused) awoke and then he put quilt on her person and took her to hospital. However, it is worth to note that complainant has stated that when she came

to know about the burn injuries sustained by Taibai she and her son went to Civil Hospital and when they made query with Taibai she told that on that day when she was sleeping accused threw lighted kerosene lamp (Chimni) on her person and set her on fire. The witness Chandrabhan Exh.25, brother of deceased Taibai, has also stated that at that time Taibai told him that when she was taken to Hospital the accused told her that she should not disclose anything to Police and otherwise he would not maintain her. So, one thing is certain that when the said Dying Declaration was recorded, besides accused nobody else had an occasion to talk to her prior to the said recording of Dying declaration. So, it is quite possible that accused must have given such threat and under such circumstances, due to tutoring she might have deposed accordingly to the Special Judicial Magistrate Bawiskar. But that statement under the circumstances can not be said to be voluntary and reliable.

17. If we take into consideration all the facts and circumstances of the case then this theory of Taibai sustaining burn injury as a result of the accidental fall of burning kerosene lamp (chimani) from the stool does not appear to be true and probable. The first and

for most reason for this is that though there is reference of stool in the said statement there is no convincing evidence to show that such stool was actually in existence in the room at the relevant time. If we see panchanama of place of offence at Exh-17 we find that there is absolutely no mention of the stool in the said panchanama though there is mention about all other articles such as cot, folding cot, rack, cupboard, utensils, umbrella etc. If really stool would have been there in the house then normally we would have found mention of the same in the panchanama. But, as there is no such mention it shows that the defence taken by the accused in this behalf is false. A stray admission is given by the pancha that there was stool but if that statement would have been correct then certainly there would have been mention of the stool even in the panchanama when there is specifically mention of all other articles in the room. There is another important circumstance which also suggests that the theory of kerosene lamp falling from the stool as a result of the dash of deceased is false. If we see the medical evidence we find that deceased had sustained burns to her head and upper body more than the legs . If lamp had fallen as a result of the kick of the deceased there would have been more burn injuries to

legs. But that has not happen. So, under the above circumstances, we are of the view that the defence version in this behalf can not be accepted and the statement made by the deceased Taibai before Special Judicial Magistrate Bawiskar was not voluntary but it was under duress and it was as a result of the threat given by the accused and the apprehension in the mind of the deceased that accused would not maintain her. So, we are not inclined to accept the above mentioned dying declaration.

18. There is another dying declaration which is recorded by Special Judicial Magistrate Jaiprakash on 16/10/1988 at 5.30 pm. It is at Exh-23. If we see the said dying declaration we find that therein the deceased has specifically stated that accused used to assault her and ill-treat her and on the day of incident, he threw lighted kerosene lamp on her person and set her on fire. We can not ignore the fact that if really the deceased had an intention to rope the accused falsely then she would not have stated in the said dying declaration that accused subsequently at late stage put quilt on her person and took her to Civil Hospital. It does appear that after the time the deceased was set on fire, the accused made some attempt

to extinguish the fire. It must be obviously due to the fact that deceased Taibai started shouting and neighbours gathered. During the said process of extinguishing fire the accused sustained some minor burn injury to his hands. Even the Doctor has said that accused had hardly 2% burns. Merely because accused made such attempt at subsequent stage, we can not jump to the conclusion that the statement of Taibai that accused threw lighted kerosene lamp on her person is not trustworthy.

19. Though it is true that the said dying declaration does not bear thumb impression of Taibai, the Special Judicial Magistrate has specifically stated that as thumbs of Taibai were having burn injuries it was not possible to obtain her thumb impression and as such it has not been obtained. It is also accordingly mentioned in the dying declaration Exh-23. There is no other infirmity in the above mentioned dying declaration. Doctor has certified that the said dying declaration was made by the patient viz. Taibai when she was in a position to speak.

20. It must be noted that the said dying declaration is also corroborated by other two earlier

dying declarations made by Taibai before complainant and her brother. Incidently, it must be noted that if really Taibai had sustained burn as a result of accidental fall of Chimani on the person of Taibai then normally, she would not have sustained such grave burns to all her body. So this also indicates that theory of Taibai sustaining burn injuries due to accidental fall of Chimani can not be accepted.

21. It must be noted that Law regarding dying declaration is well settled. While appreciating the evidence of dying declaration the Court has to keep in mind that the maker of the statement was not available for cross-examination. However, at the same time, there is no rule of law that conviction can not be sustained on the basis of dying declaration or that the dying declaration can not be accepted unless there is corroboration. If the Court finds that the dying declaration is truthfull and reliable then certainly conviction can be based on such dying declaration. It is true that in the instant case there are two dying declarations which are contradictory to each other. But that does not mean that under such circumstances, the Court must give benefit of doubt to the accused. We have already pointed out as to why the first dying

declaration can not be accepted and how the same is not free from doubt and as against that the subsequent dying declaration is a true and reliable dying declaration. It is pertinent to note that the evidence of complainant and her son in respect of Taibai disclosing the incident to them is also not at all shaken or shattered in their cross-examination. We can not ignore the fact that the moment complainant came to know about the act of the accused from Taibai, she immediately rushed to the police station and lodged the complaint. There is nothing on record to indicate that she prepared a false and concocted story. In fact, it is not even suggested to above mentioned two witnesses that they are deposing falsely because they are having any grudge or grievance against the accused. Only suggestion that has been put to them is that they are deposing falsely at the instance of Police. It is already pointed out as to how this suggestion is baseless and is not even worthy of consideration. So, having regard to all these facts and circumstances of the case in our considered view the Prosecution has proved beyond reasonable doubt that the accused was harassing and ill-treating Taibai and she was subjected to cruelty and ultimately, he threw lighted kerosene lamp on her person and set her on fire and caused her

death. Hence, we do not find any substance in the appeal.

O R D E R

1. The appeal is dismissed.

2. The order of conviction and sentence passed by the Second Additional Sessions Judge, Nashik against the accused is confirmed.

3. The accused to surrender bail within 8 weeks from today failing which the Trial Court to take necessary steps to arrest the accused and send him to jail to undergo the sentence in this case.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)